EXHIBIT D

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REGGIE WHITE, et al.,

Plaintiffs,

v.

NATIONAL FOOTBALL LEAGUE, et al.,

Defendants.

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BEFORE SPECIAL MASTER

JACK H. FRIEDENTHAL

RE: WALLY WILLIAMS

NFL CASE #8

APPEARANCES:

FOR THE WHITE CLASS:
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I. THE BACKGROUND OF THE DISPUTE:

By agreement of the National Football League Players Association (NFLPA) and the National Football League Management Council (NFLMC), the deadline for a team to declare one of its players as a Franchise Player for the 1998 League Year was on or before February 12, 1998. The Baltimore Ravens Club designated Wally Williams as its Franchise Player at approximately 8:15 P.M. on February 12, 1998. The NFLPA claims that the designation was ineffective because of a tacit agreement of long standing between the NFLMC and the NFLPA that imposed a deadline of 4:00 P.M. on the last day of the designation period after which no designation would take effect. There is no dispute that without such an agreement as to a specific deadline, a Franchise Player could be designated up until midnight of the final date for such designations.

II THE NATURE OF THE ISSUES:

There are two basic issues involved in this dispute:

1. Does the last sentence of Section 19 of Article LV of the NFL Collective Bargaining Agreement (CBA) require that to be effective, an agreement to impose a 4:00 P.M. deadline under Article XX, Section 1, must be in writing?

2. If the answer to 1. above is "no," does the available evidence establish an unwritten agreement between the NFLMC and the NFLPA to set a deadline of 4.00 P.M.?

III THE ARGUMENTS:

A. THE REQUIREMENT OF A WRITTEN AGREEMENT

The last sentence of Section 19 of CBA Article LV reads, "None of the Articles of this Agreement may be changed, altered or amended other than by a written agreement." Section 1, of Article XX reads in part, "any . . . [Franchise Player] designation must be made between February 1 and February 15 of each League Year or during such other period as may be agreed on by the NFL and the NFLPA."

The NFLMC argues that any change in the date or imposition of a time deadline must be in writing under Section 19 above. The NFLPA argues that the imposition of a deadline does not result in a "changed, altered or amended" CBA because Section 1 of Article XX already contains within it the words "as may be agreed upon by the NFL and the NFLPA." Of course, any alteration of the CBA is permitted if the parties agree. But the NFLPA's argument implies that this cannot be considered an ordinary change, alteration or amendment because that would render the quoted words in Section 1 superfluous. Therefore it would follow that Section 19 of Article LV is inapplicable. And since Section 1 of Article XX does not specify that the agreement needs to be in writing, an oral agreement would be proper and enforceable.

The exact meaning of the quoted language of Article XX, Section 1 is not spelled out. If read to permit a non-written agreement it would conflict directly with the policy as expressed in Article LV, Section 19. One cannot use parol evidence to interpret the CBA contract, including what it means to "agree" in Article XX, Section 1, but one can look to the language of other provisions of the CBA itself to determine just what is meant. (See CBA Article LV, Section 19, and the court's decision in the Hobert\Grbach matter, White, et al v. National Football league, et al., Civil No. 4-92-906, slip opinion dated July 30, 1997, pp. 12-13: "Special Master's decision . . . [is] restricted to interpreting language used in the . . . [CBA] as a matter of law without recourse to extrinsic evidence regarding the parties' intent.")

The overriding policy as established by Section 19 is clear; alterations of the specific terms of the CBA are to be in writing. Article XX, Section 1 does not imply that a change of the date or time for a Franchise Player designation is not to be considered an alteration of specified provisions. And Section 1 itself does not specify that such a change of terms can be oral or by other than an agreement in writing. The statement that the parties can agree to alter the period of the designation can, and should, be taken only to emphasize the fact that the dates spelled out in Section 1 are not to be considered carved in stone. A requirement that an agreement between the NFLMC and the NFLPA be in writing does no violence to Section 1 and creates harmony between that Section and Section 19 of Article LV.

In addition, Section 1 specifies dates, i.e., "between February 1 and February 15 of each League Year," not times of day. The provision for change reads, "or such other period as may be agreed on by the NFL and the NFLPA." By including the word "such," the proviso appears to relate only to a different period of days, not times. Thus, it can fairly be said that a time designation (other than midnight) is an alteration of Section 1 that falls within Section 19 of Article LV.

Therefore, in looking at the CBA as a whole, and in particular the policy expressed by Section 19 of Article LV, I find that the alleged imposition of a 4:00 P.M. deadline could not be effective unless there was a written agreement to that effect.

B **THE FAILURE TO ESTABLISH THE EXISTENCE OF AN AGREEMENT TO IMPOSE A 4:00 P.M. DEADLINE:**

Class Counsel is correct in stating that the ban on parol evidence in Article LV, Section 19, to interpret the CBA does not bar evidence to establish the existence or nonexistence of a subsequent unwritten agreement, assuming that such an agreement is not barred by the last sentence of Section 19. However, even assuming that imposition of a 4:00 P.M. deadline did not require a written agreement by the parties, the facts set forth on behalf of the NFLPA do not establish by a preponderance of the evidence the existence of any agreement to that effect.

1. Counsel relies on a series of internal NFL documents, provided each year during the existence of the CBA, that inform the individual Clubs that they have until 4:00 P.M. on the last day of the designation period to make a designation. Obviously, this alone does not constitute an agreement with the NFLPA. See Waterways Ltd. v. Barclays Bank, 202 A.D.2d 64,74, 615 N.Y.S.2d 8986, 892-93 (1994). There is no evidence that the NFLPA was asked to agree to the contents of these communications or that it did so in any positive way. The same is true of the fact that newspaper stories sometimes have stated that such a deadline exists. The failure of the NFLPA somehow to raise the issue is not enough to establish an agreement. This is not a situation where agreement can be determined by silence; indeed the failure ever to raise the issue until now can be taken as assent to the fact that it is up to the NFLMC to do as it wishes with regard to establishing and waving a time deadline.

2. Class Counsel argues that an agreement on the 4:00 P.M. deadline between the NFLPA and the NFLMC is shown by an oral exchange among Mr. Levy, the attorney for the NFLMC, the Special Master, and Mr. Kessler, Class Counsel for the Players, in a case heard on February 15, 1994. Neither the language nor the circumstances bear that out.

As quoted by Class Counsel in its brief in the current matter (see Letter of Class Counsel, Jeffrey Kessler, dated March 2, 1998 to Special Master Friedenthal, pp. 3-5), Mr. Levy begins the 1994 exchange by stating:

> Yes. In that regard, I might note that the League has set for its own administrative convenience a deadline for clubs to notify the Management Council of their franchise player designations. And our plan, we assume no one has any problem with that, is to suspend that deadline for purposes of this proceeding to allow you whatever time you think is necessary to resolve the issue. (Emphasis supplied by Class Counsel.)

The discussion then continued as follows:

SPECIAL MASTER: In other words, even beyond midnight?

MR. LEVY: No. We don't plan beyond midnight. (Emphasis supplied by Class Counsel.)

MR. KESSLER: The agreement says the 15th. I don't think we have the power to suspend beyond that. What the League is saying, they internally set 4:00 p.m. as their deadline, but they are willing to give you the time, obviously to decide today. (Emphasis supplied by Class Counsel.)

The above statements hardly establish the existence of an agreement between the NFLMC and the NFLPA as to a 4:00 P.M. deadline. The phrase "we assume no one has any problem with that" can simply be regarded as a statement that it was within the prerogative of the NFL to waive the rule and that no one else had a right to object. Moreover, the failure of Class Counsel directly to address the matter can just as well be considered as an admission of Class Counsel that it has no right to interfere with what Class Counsel specifically recognizes as the League's "internally set . . . deadline." Class Counsel goes on to say, "they [the NFLMC] are willing to give you the time." This appears to be a firm recognition that the power is solely within the power of the NFLMC. At no point does Class Counsel say anything to the effect that "We concur" or "We give our permission."

There is an additional argument arising from Class Counsel's statement in regard to going beyond midnight: "The agreement says the 15th. I don't think we have the power to suspend beyond that." [Emphasis added.] The reason for this statement must be that there was no agreement to alter the time for making a Franchise Player designation as set forth in Article XX, Section 1 of the CBA (and, incidentally, a belief that they could not alter it by an oral agreement on the spot). As noted above, Class Counsel then went on to speak of the suspension of the 4:00 P.M. deadline as follows, "they [the NFL] are willing to give you the time." [Emphasis added.] The use of the word "we" with regard to the suspension past midnight contrasted with the word "they" with regard to the suspension of the 4:00 P.M. deadline shows that the NFLPA did not believe that it had an agreement as to the latter.

Finally, in Mr. Levy's initial statement, he states that the NFLMC suspends the deadline "for purposes of this proceeding." [Emphasis added.] In his brief Class Counsel refers to the fact that another player, on a different team, who was not involved in a proceeding of any kind, was, on the same evening after 4:00 P.M., designated a Franchise Player. (See Letter from Class Counsel to Jack Friedenthal, dated, March 2, 1998, p. 6 n.1, and Exhibit J to that Letter.) The suspension for "this proceeding" obviously did not cover the designation of the second player and Class Counsel provides no evidence whatsoever that the NFLPA agreed in advance to that designation or objected to it or raised an issue as to its propriety. If silent acquiescence is to be considered sufficient to establish an agreement, then Class Counsel could be said to have agreed that the NFLMC could waive any 4:00 P.M. deadline on its own.

3. There is additional evidence to contradict of Class counsel's evidence of the existence of a subsequent agreement to establish the 4:00 P.M. deadline.

In a brief submitted on behalf of the Baltimore Ravens (See Letter from Ralph S. Tyler to Jack Friedenthal, dated March 2, 1998, p. 3 and Exhibit 2) there is a written letter agreement prepared by the NFLMC and signed by counsel for the NFLPA that, among other things, sets February 12, 1998 as the last day on which a Franchise Player can be designated. There can be no doubt that this written agreement is a valid alteration of the date of February 15 set out in Article XX, Section 1 of the CBA. It does not, however, specify a 4:00 P.M. deadline or any other time deadline.

To overcome any implication that a written agreement pursuant to Article XX, Section 1 that changes the day, but does not include a time deadline, would obviate a previous time deadline (assuming one existed), Class Counsel notes that a preamble paragraph states: "In order to maintain a schedule similar to previous years, we recommend the following dates for the 1998 League Year." Class Counsel relies on the word "similar" to imply the continuation of the alleged deadline. Of course "similar" does not mean "identical." On the other hand, the document refers only to "dates" and would not by itself entirely preclude the existence of a time deadline if there was strong evidence that a separate agreement for such a deadline existed.

The NFLMC also refers to a summer 1997-1998 NFLPA Player Planner, provided to the players and including a calendar of important dates. In the calendar reference to February 12, 1998, it states that that is the last date by which a player can be designated a Franchise Player, but it says nothing about a 4:00 P.M. deadline. However, regarding other dates on the calendar, specific time deadlines are set forth, e.g., on August 24 club rosters must be cut to no more than 53 players by 4:00 P.M. Eastern Daylight Time, on August 25th clubs must establish their practice squads by 4:00 P.M. Eastern Daylight Time and on August 29 clubs are required to name their 49 player active list by 7:00 P.M. Eastern Daylight Time. Not only does this list of dates and times indicate that the NFLPA does not believe that there is an agreement to a 4:00 P.M. deadline for designating Franchise Players, but it is also significant to establish that players have sound reason to discount newspaper reports that such a 4:00 P.M. deadline exists.

4. Class Counsel also argues that even if no agreement was reached by the parties as to an alternate 4:00 P.M. deadline pursuant to Article XX, Section 1, parol evidence is permitted to show a course of performance subsequent to a contract (in this case the CBA itself) to establish an understanding of the parties as to that contract. He cites a number of authorities for this proposition. (See Letter from Class Counsel, Jeffrey Kessler, to Jack Friedenthal, dated March 2, 1998, p. 6.) A number of these authorities support the proposition that parol evidence can establish a subsequent agreement between parties, and as to that fact we agree, as we said at the outset. However, that is irrelevant to the argument made here that even in the absence of a subsequent agreement, parol evidence of subsequent conduct can be used to show the meaning of the initial contract itself, which seems to be the thesis of Class Counsel as supported by Viacom, Int'l, Inc. v. Lorimar Productions, Inc., 486 F. Supp. 95, 98 n.3 (S.D.N.Y. 1980).

The problem with the argument is that it ignores the difference between "parol evidence" and the "parol evidence rule." Parole evidence is evidence outside the four corners of the a document to establish the meaning of the document. The parol evidence rule is a legal determination of when parol evidence can or cannot be utilized. The parol evidence rule permits, in certain cases, the admission of parol evidence to establish subsequent conduct by the parties to a contract in order to prove what the parties meant by the terms of the contract. However, under Section 19 of Article LV of the CBA, application of the parol evidence rule is superceded by a flat prohibition of the use of parol evidence. Section 19 reads "the parties shall not, in any proceeding or otherwise, use or refer to any parol evidence with regard to the interpretation or

meaning . . . [of specified Articles including Article XX] of this Agreement." [Emphasis added.] As Judge Doty has held in prior matters in the White case, this provision bars the use of "any extrinsic evidence regarding the parties' intent." (See, e.g., the Hobert/Grbach Matter, White, et al. v. National Football League, et al., slip opinion dated July 30, 1997, pp. 12-13.) Thus, evidence of activities of the parties subsequent to the CBA cannot be used or referred to in determining the meaning of Article XX of the CBA.

Even if parol evidence could be used to establish, by subsequent conduct, an interpretation of Section 1 of Article XX, there is no evidence to show that a 4:00 P.M. deadline could be read into Section 1. The NFLPA itself has taken no steps that would result in showing its operations are in line with such a practice and the NFL's actions contradict the practice in several ways. The 1994 exchange before the special master as quoted in paragraph 2, above show clearly that the NFLMC considered the matter as one of administrative convenience for the League and said so openly. And we have already noted that the NFL on several occasions, including the present one, unilaterally set the rule.

Finally, Class Counsel raises an argument that the Players are third-party beneficiaries, presumably to a contract between the NFLMC and its member teams. The 4:00 P.M. deadline was set by the NFLMC. There is no indication that this was the result of a contract between the NFLMC and the Clubs. The deadline was simply imposed by the NFLMC. That it was not considered a binding contract between them is established by the fact that the Baltimore Ravens requested to go beyond the 4:00 P.M. deadline and the request was granted. And as discussed in paragraph 2, above, in 1994, the NFLMC also unilaterally permitted a Club to make a designation after 4:00 P.M. In neither case is there any indication that the other non-involved Clubs were asked for permission which would have been the case if they were parties to an agreement.

V DECISION:

Pursuant to CAB Article LV, Section 19 and the policy there reflected, an Agreement under Section 1 of Article XX to establish a time for the designation of Franchise Players must be in writing. Since no such written agreement exists as to a 4:00 P.M. deadline, a designation up until midnight on February 12, 1998, was appropriate and effective.

Even if a written agreement was not required, the preponderance of the evidence fails to establish that the parties entered into any agreement that provided for the 4:00 P.M. deadline or that the Players are otherwise entitled to rely upon such a deadline.

Therefore the designation of Wally Williams as a Franchise Player was timely, valid, and effective.

Jack H. Friedenthal
Special Master
March 9, 1998